BEFORE
THE FEDERAL MARITIME COMMISSION

DOCKET NO. 24-04

ICL USA, Inc.

vs.

Dependable Highway Express, Inc. and Mediterranean Shipping Company, (USA) Inc. on behalf of Mediterranean Shipping Company, S.A.

RESPONDENT'S VERIFIED MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; AND REQUEST FOR SANCTIONS

For the reasons more fully set out in the Memorandum in Support set forth below, Respondent Dependable Highway Express, inc. ("Dependable") respectfully moves pursuant to 46 C.F.R. § 502.69(g) and 46 C.F.R. § 502.70 to dismiss the complaint ("Complaint"), as against Dependable only, filed by Complainant ICL USA, Inc. ("ICL") and served by the Federal Maritime Commission ("Commission") on January 12, 2024, for the lack of jurisdiction over Dependable and for the failure to state a claim against Dependable upon which relief can be granted. Dependable also requests sanctions for ICL's violation of 46 C.F.R. § 502.6(a).

Dependable is a southern California port drayage trucking company being dragged into a "service contract" dispute (involving detention charges) between ICL and Respondents Mediterranean Shipping Company S.A and Mediterranean Shipping Company (USA), Inc. (the "MSC Respondents"). In short, Dependable is not a "regulated entity" over which the

Commission's regulatory jurisdiction extends and accordingly the Commission does not have personal jurisdiction over Dependable.

Even if the factual allegations against Dependable were true (which is denied), the Complaint fails to state causes of action upon which relief can be granted because the statutes and regulations allegedly violated by Dependable, by their express terms, do not apply to Dependable as a non-regulated entity.

Finally, Dependable submits that the Complaint as against Dependable was filed only for an improper purpose within the meaning of the Commission's Rules of Practice and Procedure at 46 C.F.R § 502.6(a), namely, to cause unnecessary delay of Dependable's federal court action against ICL as described in footnote 2 and to needlessly increase Dependable's litigation costs. Dependable submits that, given ICL's counsel's extensive knowledge of the Shipping Act and its regulations and his extensive experience before the Commission, ICL's filing against Dependable was a willful violation of 46 C.F.R § 502.6(a). Under the authority of that section, Dependable respectfully requests that the Commission award sanctions against ICL equal to the attorneys' fees and costs incurred by Dependable in appearing in this proceeding, according to proof.

MEMORANDUM IN SUPPORT

A. Relevant Facts

As alleged in paragraph 4 of the Complaint, Dependable is a port drayage trucking company based in southern California and serving the ports of Los Angeles and Long Beach. Dependable performed port drayage services for ICL from approximately August 2021 through February 2022. Dependable duly invoiced ICL for its charges, including the base dray freight charges, fuel, yard storage, chassis rental, demurrage and detention charges that were billed to Dependable by VOCCs and that Dependable paid, an administrative fee for detention charges paid, and contractual interest[1].

ICL refused to pay the full amount of the invoiced charges, including the detention charges. In July of 2023 Dependable filed a civil action in contract against ICL in the United States District Court for the Central District of California seeking payment of fees and charges for the port drayage services[2]. In response, ICL filed this proceeding before the Commission and filed a Motion to Stay in that federal court action pending resolution of this proceeding.

B. The Commission's Rule 12 Standard

Rule 12 of the Commission's Rules of Practice and Procedure (the "Rules") states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. As the Commission's Rules do not address motions

[1] Contrary to the allegations in paragraphs 9(c) and 25 of the Complaint, and although not relevant to this Motion, Dependable is not seeking from ICL an administrative fee or interest on detention charges that Dependable did not actually pay.

[2] That civil action is *Dependable Highway Express, Inc. v ICL USA, Inc. et al*., number 2:23-cv-05484-DDP-E.

to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in such cases[3].

In the case of a motion to dismiss for lack of jurisdiction, such as this one, a respondent has a choice of making a facial attack on jurisdiction – in which case well-pleaded allegations are assumed true – or a factual attack, in which case the allegations in the complaint are not assumed but must be supported by evidence. As the Commission has explained:

> "Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction.[4]

This Motion to Dismiss for lack of jurisdiction, which is supported by the verification of Michael Dougan, Dependable's Chief Financial Officer, makes a factual attack on jurisdiction, although a facial attack would be equally successful given Complainant's failure to plead anything more than incorrect legal conclusions, unsupported by allegations of fact.[5]

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible

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[3] *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, Docket No. 06-02, 2007 WL 2468431 (F.M.C. Aug. 2, 2007).

[4] *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.* 32 S.R.R. 126, 136 (FMC 2011) (emphasis added). See also *Carlstar Group LLC v. UTI United States, Inc.,* 1 F.M.C. 2d 103 at 116 (ALJ 2018); *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16 (ALJ)(slip op. January 17, 2017), 2017 FMC LEXIS 4 (ALJ 2017).

[5] The Commission "need not accept 'legal conclusions cast in the form of factual allegations.'" *Cornell v. Princess Cruise Lines, Ltd*., 33 SRR 614, 621 (FMC 2014). Likewise, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

on its face."[6] A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[7] The first step typically is to identify legal conclusions in pleadings that are not entitled to the assumption of truth.[8] The second step is to assume the truth of the factual allegations and determine "whether they plausibly give rise to an entitlement to relief."[9]

B. The Commission Lacks Personal Jurisdiction over Dependable Because it is Not a Regulated Entity

The Commission's regulatory jurisdiction extends only to certain types of entities (referred to as "regulated entities"). Those are "Ocean Common Carriers," also known as vessel-operating common carriers or VOCCs, "Marine Terminal Operators," "Non-Vessel-Operating Common Carriers," and "Ocean Freight Forwarders." The Complaint does not allege that Dependable is any of these entities. In fact, Dependable is not one of these entities, as the attached Verification of Michael Dougan attests.

Instead, in order to obtain jurisdiction over a non-regulated entity, the Complaint alleges a novel "agency" theory, that Dependable is the "invoicing and collections" agent of the MSC Respondents, acting "in conjunction with" the MSC Respondents in a way that violates the Shipping Act of 1984, as amended (the "Shipping Act"). Generally, the Complaint alleges that…

1. a trucker who performs port drayage services for an NVOCC related to U.S. import containers;
2. who is not a party to the service contract between the NVOCC and the VOCC in which the number of "free days" and the daily detention rate are negotiated and agreed between the NVOCC and the VOCC;
3. who is nonetheless billed detention charges by the VOCC;
4. who timely pays such charges in order to avoid being "shut out" of the VOCC's terminal for all future business;

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[6] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
[7] *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).
[8] *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 58 (FMC 2015).
[9] *Id.*

5. who timely bills its NVOCC customer for such charges, by transparently attaching all of the VOCC's original detention invoices to its bills;
6. who adds to its bills a 10% administrative fee to reflect the administrative cost and expense of having to pay such detention charges and then in turn having to collect them from its customer the NVOCC, and to reflect the increased credit risk associated with advancing such detention charges on behalf of its customer the NVOCC …

… thereby becomes an agent of the VOCC, providing "invoicing and collection services in the … liner trade" "on behalf of" the VOCC (Complaint, page 3, paragraph 9(b)), and thereby becoming subject to Commission jurisdiction. The Complaint alleges that such a trucker becomes a party who "assessed per diem related charges while not qualified to do so" in violation of the Shipping Act (Complaint, page 2, paragraph 4). The Complaint alleges that such a trucker becomes a "person" who "in conjunction with" a common carrier (i.e., the MSC Respondents in this matter) "directly or indirectly" provided services in the liner trade that is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff or service contract, all within the meaning of 46 U.S.C. § 41104(a)(2)(A) (Complaint, page 3, paragraph 9(b)).

Dependable does not disagree with the allegations in the Complaint that the Commission has primary regulatory jurisdiction over ICL and the MSC Respondents and the dispute between them. That dispute arises directly out of a service contract negotiated between a VOCC and an NVOCC, and the Commission clearly has regulatory jurisdiction over that service contract and the parties to it. Dependable only seeks dismissal of the Complaint as against it, not as against the MSC Respondents.

However, jurisdiction over Dependable is another matter. There is no legal or regulatory support for the allegation that a trucker, dragged into a billing dispute between two parties to a service contract, who has been forced to pay detention charges in order to avoid being "shut out" of a port terminal, and who transparently seeks reimbursement of such charges from its NVOCC

customer by including the VOCC's original detention invoices within its bills, thereby becomes subject to Commission jurisdiction.

This is obviously not the first time the Commission has considered the issue of the role (actually the plight), of truckers in the context of demurrage and detention practices in the U.S. Following a 2016 petition to the Commission by a group of aggrieved truckers and other intermediaries, the Commission launched a fact-finding investigation in March of 2018 into practices of VOCCs and MTOs with respect to demurrage and detention charges. The Commission issued a Notice of Proposed Rulemaking ("Proposed Interpretive Rule") on September 13, 2019.[10] In the Proposed Interpretive Rule, at page 13, the Commission began to consider proposals in the billing of demurrage and detention that would promote transparency and alignment of stakeholder interests. One of those proposals was that "ocean carriers would bill cargo interests directly for use of containers"[11]. In other words, ocean carriers should not bill truckers and other intermediaries who are not parties to the service contracts (which contain the terms governing free days and demurrage and detention) and who also are in no position to incentivize cargo movement.

Following the Proposed Interpretive Rule, the Commission adopted the final Interpretive Rule on Demurrage and Detention Under the Shipping Act ("Final Rule"), appearing in the Federal Register on May 20, 2020.[12] The Final rule continues this theme: "It is important to emphasize, however, the Commission's focus here is on practices related to charges imposed by regulated entities on shippers, intermediaries, and truckers …"[13] (emphasis added). Further, the Commission

[10] Fed. Mar. Comm'n, *Proposed Interpretive Rule on Demurrage and Detention* Issued September 13, 2019, published at 84 FR 48850 – 48856 on September 17, 2019.
[11] *Id*., 84 FR at 48854.
[12] Fed. Mar. Comm'n, *Final Interpretive Rule on Demurrage and Detention Under the Shipping Act* Issued April 28, 2020, published at 85 FR 29638 – 29666 on May 20, 2020.
[13] *Id*., at 29650.

acknowledged in the Final Rule that "ocean carriers should bill their customers, rather than imposing charges contractually-owed by cargo interests on third parties".[14]

More recently, the Commission has gone further with this concept, and on October 7, 2022 issued a Notice of Proposed Rulemaking regarding specific Demurrage and Detention Billing Requirements.[15] The Commission has stated that, if the proposed rule is adopted, VOCC's, NVOCCs, and MTOs will all be required to issue bills for demurrage or detention only to parties that they have a contractual relationship with…".[16] Specifically, the Commission is proposing that:

> "a properly issued invoice is an invoice that is only issued to the person that has contracted with the billing party for the carriage of goods … and is therefore the person responsible for the payment of any incurred demurrage or detention charge. This is often the shipper of record. The proposed rule would prohibit billing parties from issuing demurrage and detention invoices to persons other than the person for whose account the billing party provided ocean transportation…"[17].

The Commission further stated in the October 2022 Notice of Proposed Rulemaking that it believes that:

> "prohibiting billing parties from issuing demurrage and detention invoices to persons with whom they do not have a genuine commercial relationship will similarly benefit the supply chain. If the billed party has firsthand knowledge of the terms of its service contract with a common carrier, then they are in a better position to ensure that both they and the carrier are abiding by those terms. When demurrage or detention invoice disputes do arise, the billed party is in a better position than third parties such as truckers and customs brokers to analyze the accuracy of the charge. Further, when the billed party disputes a charge, they have an existing commercial relationship with the billing party and are in a better position to resolve the dispute. Practically, the proposed rule would prohibit billing parties from invoicing motor carriers or customs brokers. If adopted, the proposed rule would not prevent motor carriers from paying on behalf of the billed party. Although a

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[14] *Id*., at 29661.
[15] Fed. Mar. Comm'n., Notice of Proposed Rulemaking, *Demurrage and Detention Billing Requirements* Issued October 7, 2022, published at 87 FR 62341 – 62358.
[16] See https://www.fmc.gov/fmc-proposing-new-demurrage-detention-billing-requirements/#:~:text=If%20this%20proposed%20rule%20is,accruing%2C%20and%20provide%2030%20days
[17] 87 FR at 62348.

> motor carrier could pay on behalf of a billed party, the motor carrier would not be liable for these charges and could not be penalized for nonpayment of charges."[18]

The point is this: the regulatory record is replete with evidence that drayage truckers are not acting as invoicing and collections "agents" on behalf of the VOCC carriers when they seek reimbursement from their customers of detention charges that they have been forced to pay simply in order to remain in business and not be "shut out" from port terminals.[19] Rather, in the context of demurrage and detention practices, drayage truckers are largely innocent third-parties being dragged into billing disputes involving service contracts between two parties unrelated to the truckers and containing terms that the truckers did not negotiate or agree to and know nothing about.

The latest Notice of Proposed Rulemaking on this topic indicates that the Commission is well aware of the inherent unfairness in a carrier like MSC imposing liability for detention charges on a trucker like Dependable rather than imposing that liability on ICL, the party with whom its service contract specifically defines the relevant detention terms (such as the number of "free days" and the daily detention charge). In that sense it is particularly galling that in order to "backdoor" Commission jurisdiction over Dependable (in order to further delay Dependable's lawsuit against ICL and to further postpone having to pay for Dependable's services), ICL is characterizing Dependable as being aligned with the MSC Respondents in their detention billing practices.

But, it should be clear to anyone who has followed the Commission's fact-finding and investigations into demurrage and detention practices over the last decade that Dependable is not an originating biller or assessor of charges in violation of the Shipping Act, instead it rather unfairly

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[18] *Id*., at 62349.

[19] The regulatory record reflects that the Commission is aware of the risk of truckers being "shut out" of terminals for nonpayment of detention charges, despite that such charges emanate from the service contract that the truckers are not parties to. See Final Rule, 85 FR at 29961.

bears the brunt of such charges[20]. And, having been forced to pay detention charges and in seeking reimbursement, Dependable is not "acting on behalf of" or "in conjunction with" regulated entities such as the MSC Respondents within the meaning of and in violation of 46 U.S.C. § 41104(a)(2)(A), it is simply trying to avoid losing money on drayage moves that it in good faith performed.

The allegations in the Complaint that Dependable is an "invoicing and collections" agent for the MSC Respondents, and that Dependable "in conjunction with" the MSC Respondents "directly or indirectly" assessed charges in violation of the Shipping Act are mere legal conclusions lacking any factual underpinnings. The Commission should not accept these legal conclusions cast in the form of factual allegations.[21]

As demonstrated by the attached Verification of Michael Dougan, Chief Financial Officer of Dependable, the allegation in the Complaint that Dependable is an "invoicing and collections" agent acting on behalf of the MSC Respondents is entirely incorrect. In reality, Dependable is not and never has been an agent of either of the MSC Respondents. There is no express or implied agency relationship existing between Dependable and the MSC Respondents. Dependable has never had any conversations or discussions with the MSC Respondents about becoming its "invoicing and collections" agent, and Dependable has no authority from the MSC Respondents to invoice or collect detention charges on behalf of the MSC Respondents.[22] ICL's "agency" theory is a complete fiction and not "well grounded in fact" within the meaning of 46 C.F.R § 502.6(a).

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[20] For purposes of Dependable's request for sanctions, given ICL's counsel's extensive experience before the Commission and with the Shipping Act generally, this is something that ICL's counsel should know.

[21] See footnote 3.

[22] Even if Dependable were an agent for the MSC Respondents, which is denied, both the Commission and the courts have recognized that an agent of a regulated entity is not itself a regulated entity unless it independently meets the statutory requirements for such an entity. Thus, in *Landstar Express Am., Inc. v. FMC,* 569 F.3d 493 (DC Cir. 2009), the U.S. Court of Appeals for the D.C. Circuit held that the Shipping Act does not allow an agent of a common carrier to be regulated as a common carrier unless such entity holds out in its own name to perform as a common carrier. Chief Administrative Law Judge Wirth has recently concluded that the general agent for an ocean common carrier is

D. The Complaint Fails to State a Claim Against Dependable Upon which Relief Can Be Granted

The Complaint asserts violations of two provisions of the Shipping Act and one C.F.R. regulation. Count I alleges a violation of 46 U.S.C. § 41104(a)(2)(A), 46 U.S.C § 41102(c), and 46 C.F.R. § 545.5, while Count II alleges a violation of 46 U.S.C. § 41104(a)(2)(a). All of these sections, however, prohibit conduct only by regulated entities over which the Commission has jurisdiction.

Thus, 46 U.S.C. § 41104(a)(2)(A) states that:

> "[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not… provide service in the liner trade that is … not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title".

It is clear from the allegations in paragraphs 9(a) and (b) and paragraph 20 of the Complaint that Dependable is alleged to be the "person" within the meaning of 46 U.S.C § 41104(a) who, "in conjunction with" the common carrier (in this case MSC Respondents), acted in violation of the Shipping Act. However, 46 U.S.C. § 41104(a) only prohibits conduct by the common carrier. 46 U.S.C. § 41104(a) does not say that "a common carrier *or any other person in conjunction with such common carrier*, shall not" engage in the prohibited conduct. 46 U.S.C § 41104(a) *only* says that *the common carrier* shall not engage in the prohibited conduct, either alone or in conjunction with any other person, directly or indirectly.

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not thereby an ocean common carrier itself. In *OJ Commerce, LLC v. Hamburg Sud*, 6 F.M.C. 2d 165 (ALJ 2023), Chief Judge Wirth concluded that Hamburg Sud North America, the general agent for Hamburg Sud was not a regulated entity, but rather, a non-jurisdictional "other person" with which the ocean carrier operated. She reached this conclusion even though the Complainant alleged that the agent actually participated in the actions claimed to violate the Shipping Act.

In other words, even if the allegations in the Complaint were true that Dependable was the "invoicing and collections" agent for the MSC Respondents and even if Dependable were the "person" referred to in 46 U.S.C. § 41104(a) (both of which are denied), the statute *only* prohibits conduct by the regulated entity, the common carrier. Applying the Rule 12(b)(6) standard as described above, to assume the truth of the factual allegations and determine whether they plausibly give rise to an entitlement to relief,[23] the only conclusion is that ICL is not entitled to relief under 46 U.S.C. § 41104(a)(2)(A) since there is no violation of that statute because Dependable is not a common carrier.

Similarly, 46 U.S.C. § 41102(c) states that:

> "a common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

This statute does not even describe the possibility that some other non-regulated "person" might somehow be involved in the prohibited conduct, the *only* entities mentioned in 46 U.S.C § 41102(c) are regulated entities. And, as has been established, Dependable is not a regulated entity. It is literally not possible for Dependable to violate 46 U.S.C § 41102(c). ICL is not entitled to relief under 46 U.S.C. § 41104(a)(2)(A) since there is no violation of that statute because Dependable is not a common carrier, marine terminal operator, or ocean transportation intermediary.

Similarly, 46 C.F.R. § 545.5, involving interpretation of the Shipping Act regarding unjust and unreasonable practices with respect to demurrage and detention, states in subsection (b):

> ***"Applicability and scope.*** This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean

[23] See footnote 9, above.

> transportation intermediaries ("regulated entities") related to the use of marine terminal space (*e.g.,* land) or shipping containers, not including freight charges." (emphasis added).

Again, it is clear from the very words of this code section that it *only* applies to regulated entities, and it even defines the regulated entities to which it applies. Again, ICL is not entitled to relief under 46 C.F.R. § 545.5 since there is no violation of that regulation because Dependable is not a common carrier, marine terminal operator, or ocean transportation intermediary.

Accordingly, the two Counts in the Complaint do not allege conduct by Dependable that amount to violations of the statutes and regulation cited, and absent such violations, ICL is not entitled to relief. Even if one were to assume that the Complaint's factual allegations are true (which is denied), the Complaint fails to state a claim against Dependable upon which relief can be granted.

E. Request for Sanctions Under 46 C.F.R. § 502.6(a)

This proceeding is about ICL's dispute with the MSC Respondents involving their service contract and whether or not the MSC Respondents charged detention when empty containers could not be returned. Dependable is a port drayage trucking company who has a completely separate dispute with ICL over its nonpayment of port drayage fees and related charges, including reimbursement of detention paid by Dependable. After unsuccessfully demanding payment for a year and a half, Dependable ultimately sued ICL in federal court in California. ICL's response was to initiate this proceeding and to simultaneously file a Motion to Stay Dependable's lawsuit in federal court pending resolution of this proceeding.

As has been demonstrated above, there is no basis for the assertion of Commission jurisdiction over Dependable. ICL's Complaint weaves a wildly entertaining story about how

Dependable is an "invoicing and collections" agent acting "on behalf of" and "in conjunction with" MSC Respondents in order to assist in their alleged violations of the Shipping Act. Dependable is asserted to be an "assessor" of per diem charges while not qualified under the Shipping Act[24]. Dependable is alleged to be "in violation with the provisions of the Shipping Act in relation to detention charges invoiced to" Dependable[25]. Statues and regulations are alleged to have been violated by Dependable when the very language of those statutes and regulations makes clear that they only apply to regulated entities.

> Under 46 C.F.R. § 502.6(a), ICL's counsel's signature on the Complaint:
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> "constitutes a certificate by the signer that … to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument … and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation". For a willful violation of this section, a person admitted or qualified to practice before the Commission may be subjected to appropriate disciplinary action. (emphasis added)

This code section requires, at the very least, that counsel have inquired into the facts supporting the legal conclusions alleged in the Complaint that Dependable is an agent acting on behalf of the MSC Respondents. But there has been no such inquiry or discussion.

ICL's counsel is an experienced maritime attorney[26]. ICL's counsel should know that a trucker who is forced to pay detention charges (that emanate from a service contract between two completely unrelated parties) in order to avoid being "shut out" of a port terminal, and who seeks reimbursement for such detention charges after paying them, is not a regulated entity "assessing" detention charges. ICL's counsel should know that the statutes and regulations in the Complaint

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[24] Complaint, paragraph 4.
[25] Complaint, paragraph 9(b). It is absurd to allege that a party who merely receives an invoice is thus in violation of the Shipping Act.
[26] ICL's counsel's law firm website states that ICL's counsel "routinely deals with regulatory matters at the Federal Maritime Commission" and has practiced in transportation law for over 40 years.

alleged to be violated *only* apply to regulated entities, not to a port drayage trucker like Dependable.

Dependable submits that ICL's arguments regarding Dependable's alleged role and liability under the Shipping Act are not good faith arguments. Dependable submits that the only reason that ICL named Dependable in this proceeding as a Respondent, and simultaneously filed a Motion to Stay Dependable's action against it in federal court, is to "cause unnecessary delay or needless increase in the cost of litigation" within the meaning of 46 C.F.R. § 502.6(a), as a litigation tactic to continue to avoid paying Dependable for services rendered. Given ICL's counsel's experience, such conduct amounts to a "willful violation" of 46 C.F.R. § 502.6(a), and ICL and/or its counsel should be sanctioned accordingly. Dependable requests that the amount of the sanction should be equal to Dependable's attorneys' fees and costs incurred in connection with this Motion, according to proof.

CONCLUSION

Reduced to its essence, the naming by ICL of Dependable as a respondent in this proceeding involving ICL's service contract dispute with the MSC Respondents is nothing more than another stalling tactic in a 2 year pattern of stalling tactics designed to obstruct and delay Dependable's efforts to collect the money it is owed for port drayage services performed and for detention advanced.

Although ICL and the MSC Respondents and the service contract between them are all subject to Commission jurisdiction, and although the Complaint alleges that the MSC Respondents engaged in practices that violate the Shipping Act:

(i) none of this justifies the assertion of Commission jurisdiction over a non-regulated entity such as Dependable,

(ii) ICL has failed to state claims against Dependable upon which relief can be granted;

(iii) the alleged practices and violations of MSC Respondents, if true, can and should be regulated by the Commission without involving Dependable, a non-regulated entity, and

(iv) this proceeding involving parties to a service contract and allegations of detention being charged when empty containers could not be returned can be fully adjudicated by the Commission without Dependable being a party to the proceeding.

The loosely-pled legal conclusions that Dependable acted "in conjunction with" the MSC Respondents in their detention billing practices, in order to "backdoor" the Commission's jurisdiction over Dependable, are entirely incorrect and unsupported by any facts. And even if these loosely-pled legal conclusions had factual support (which is denied), relief cannot be granted based on the statutory and regulatory violations alleged in Counts 1 and 2 of the Complaint.

On the basis of the foregoing, Respondent Dependable Highway Express, Inc. therefore moves that the Complaint against it be dismissed, and for an award of sanctions.

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ATTORNEYS FOR RESPONDENT
DEPENDABLE HIGHWAY EXPRESS, INC.

VERIFICATION

I, Michael Dougan, hereby verify as follows:

1. I am the Chief Financial Officer of Dependable Highway Express, Inc. ("Dependable") and I have been employed with the company since 1989.
2. I am authorized to make this verification on behalf of Dependable.
3. I hereby verify under penalty of perjury that the facts contained in the foregoing Verified Motion to Dismiss are true and correct to the best of my knowledge, information and belief, specifically including but not limited to the following:
    a. Dependable is neither an Ocean Common Carrier, a Marine Terminal Operator, a Non-Vessel-Operating Common Carrier, nor an Ocean Freight Forwarder.
    b. Dependable is not and never has been an agent, express or implied, of either Mediterranean Shipping Company (USA), Inc. or Mediterranean Shipping Company, S.A. (the "MSC Respondents").
    c. Dependable has never had any conversations or discussions with either of the MSC Respondents about becoming a detention "invoicing and collections" agent for either of them.
    d. Dependable has no authority from either MSC Respondent to invoice or collect detention charges on behalf of either MSC Respondent.
    e. Dependable is acting on its own behalf in seeking reimbursement from ICL USA, Inc. of paid detention charges, and not on behalf of or in conjunction with any other party.

Michael Dougan
Chief Financial Officer
Dependable Highway Express, Inc.

Dated: February 5, 2024

CERTIFICATE OF SERVICE

I certify that on the 5th day of February, 2024, a true and correct copy of the foregoing

VERIFIED MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; AND REQUEST FOR SANCTIONS

was served by email on all counsel of record in accordance with 46 CFR Part 502 and the Commission's Order of May 12, 2020.

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